IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 31, 2003 Session

J. S. HAREN COMPANY v. THE CITY OF CLEVELAND, ET AL.

Appeal from the Circuit Court for Bradley County
No. V-01-1049 John B. Hagler, Judge

FILED MAY 30, 2003

No. E2002-01327-COA-R3-CV

J. S. Haren Company ("Haren") filed a complaint against The City of Cleveland ("the City") and the City's utility board – the Cleveland Utilities ("CU") – as well as other defendants, alleging, in general terms, that CU's failure to properly locate and, where necessary, relocate its utility services and facilities had hampered Haren's ability to do road improvements on a segment of U.S. Highway 11 in Bradley County, to Haren's damage. It seeks $578,400 in damages plus prejudgment interest. CU, along with four individuals, all of whom were sued as members of CU's Board of Public Utilities, filed a motion to dismiss, in which the City joined. The trial court granted the motion as to all of the filing defendants.[1] Haren appeals, contending that the factual allegations of the complaint make out a cause of action against CU. We vacate the dismissal as to Haren's claim against CU based upon the statutory remedy set forth in Tenn. Code Ann. § 54-5-854(g) (1998), affirm as to the remainder of the order of dismissal, and remand for further proceedings.

Tenn. R. Civ. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

Lex A. Coleman, Chattanooga, Tennessee, for the appellant, J.S. Haren Company.

W. Randall Wilson, Leah M. Gerbitz and Jay R. McCurdy, Chattanooga, Tennessee, for the appellee, Cleveland Utilities.

OPINION

[1] In addition to the defendants who filed or joined in the motion, the complaint also names as a defendant, "Bell South Telecommunications, Inc." It is not clear what happened to the complaint against that defendant. However, what is clear is that the trial court's order dismissing the complaint only pertains to CU, the City, and the individual members of CU's Board of Public Utilities. We have treated that order as a final judgment under Tenn. R. App. P. 3 because, as far as we can tell, it is.

I. *Standard of Review*

The motion to dismiss granted by the trial court is predicated on the failure of the complaint to state a claim upon which relief can be granted. Tenn. R. Civ. P. 12.02(6). "Such a motion challenges the legal sufficiency of the complaint," ***Trau-Med of America, Inc. v. Allstate Ins. Co.***, 71 S.W.3d 691, 696 (Tenn. 2002). Our role on this appeal is clear. We "must construe the complaint liberally, presum[e] all factual allegations to be true and giv[e] the plaintiff the benefit of all reasonable inferences." ***Id***. After we test the pleadings in this manner, we must reverse the trial court "unless it appears that the plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief." ***Cook v. Spinnaker's of Rivergate, Inc.***, 878 S.W.2d 934, 938 (Tenn. 1994). Our review is *de novo* with no presumption of correctness attaching to the trial court's judgment. ***Trau-Med of America, Inc.***, 71 S.W.3d at 696-97. The question before us is one of law.

II. *Facts*

The operative facts in the complaint, as amended,[2] are as follows:

> In September, 1998, [Haren] contracted with the State of Tennessee, Department of Transportation . . . to construct improvements on U.S. 11 (SR 2) from Paul Huff Parkway to Anatole Lane in Bradley County, Tennessee. The improvements primarily consisted of grading, underground drainage facilities and paving.
>
> The effective date of the contract was November 2, 1998 and the completion date was scheduled to be June 15, 2000. The total contract duration of the proposed work was 619 calendar days. This contract duration was established assuming that the Defendant would establish the location and, if necessary, relocate existing utilities conflicting with the construction of the road improvements prior to commencement of work.
>
> [Haren] commenced work on the road improvements in or around December 9, 1998. Soon thereafter, [Haren] encountered conflicts with existing utility services within the project area that had not yet been relocated and/or were relocated incorrectly.
>
> Many utility conflicts encountered by [Haren] consisted of undocumented, inaccurately located, and/or inaccurately relocated existing utility services within the project area.

[2] On its own motion, the trial court struck a single allegation of the amended complaint. Haren makes no issue on this appeal regarding this action by the trial court. Consequently, the stricken allegation is not recited in this opinion.

> [Haren] contends that the Defendants improperly and unlawfully established the existing locations of utilities and improperly and unlawfully relocated conflicting utilities so as to unduly interfere with plaintiff's performance of its obligations on the roadway project. As a result of the Defendants' conduct [Haren] was forced to delay construction or to perform its work on the project less efficiently and less effectively, thereby causing substantial financial loss in the amount of $578,400.

(Numbering in complaint omitted). Following these factual allegations, the amended complaint asserts four theories of recovery: negligence; negligence *per se* based upon an alleged violation of the provisions of Tenn. Code Ann. § 54-5-584(g); as a third-party beneficiary of a contract between the Tennessee Department of Transportation ("TDOT") and CU; and "strict liability" under the aforesaid code provision.

Haren's brief does not claim or argue that the trial court erred in dismissing the four individual defendants. By the same token, its brief does not provide a basis for disturbing the trial court's dismissal of the complaint as to the City. There are no factual allegations in the amended complaint or argument in the brief that associate any of the other dismissed defendants with CU's alleged culpability in causing Haren damage in connection with the latter's road improvement contract with TDOT. Consequently, this opinion will only address the alleged culpability of CU and the trial court's dismissal of the various counts of the amended complaint as to it. As to the other defendants, we find no error in the trial court's order of dismissal, and, accordingly, we affirm the order as to the individual defendants and the City.

III. *Tenn. Code Ann. § 54-5-854(g)*

Tenn. Code Ann. § 54-5-854 is a part of a statutory scheme dealing with the relocation of utility services and facilities in connection with highway construction. *See* Tenn. Code Ann. § 54-5-851, *et seq*. Subsection (g) of Tenn. Code Ann. § 54-5-854 is at the heart of Haren's complaint and also is relied upon by CU in its attempt to establish that the amended complaint fails to state a cause of action. The problem for this Court is the issue of which of two versions of this statute applies to the facts of this case. Haren argues that the version of the statute in effect when it entered into its contract with TDOT and when it commenced construction in late 1998 controls; while CU relies upon a version that did not go into effect until July 1, 1999. The parties, in a manner of speaking, "pass in the night" on this issue. Neither discusses, in its brief, its adversary's reliance on the other version and neither argues, again in its brief, why its chosen version should apply to the facts of this case. As we recall, there was very little discussion of this divergence of opinion at oral argument. We are basically left to ponder this issue on our own – which we will do.

Haren relies upon the following pre-July 1, 1999, version of Tenn. Code Ann. § 54-5-854(g) (1998):

> If any owner fails to comply with and implement the provisions of this section, the department and its contractor may then undertake construction without liability to such owner for damages to the owner's utility facilities, and in addition, such owner shall be liable to the department's contractor for damages resulting from such failure.

Effective July 1, 1999, and currently, this code provision provides as follows:

> If any owner fails to comply with and implement the provisions of this section, the contractor, with the consent of the department, may then undertake construction without liability to such owner for damages to the owner's utility facilities, and in addition, such owner shall be liable to the department's contractor for damages resulting from such failure.

As previously stated, CU urges us to utilize the current version of the statute when considering the parties' respective positions in this case. The current language was adopted by the General Assembly in Chapter 452, § 5, of the Public Acts of 1999, effective July 1, 1999.

Both sides agree that CU is an "owner" under the subject statute regardless of which version is applicable to the facts of this case. *See* Tenn. Code Ann. § 54-5-852(6).

CU's interpretation of the current version of Tenn. Code Ann. § 54-5-854 (Supp. 2002), if correct,[3] makes the selection of the controlling version of the statute of critical importance. As can be seen, the only difference in language between the versions is the verbage immediately following the introductory clause, which clause, by the way, is identical in both versions. In the earlier version, the language following that clause is as follows: "the department and its contractor may then undertake construction." In the current version of the statute, the following is substituted: "the contractor, *with the consent of the department*, may then undertake construction." (Emphasis added). CU contends that, under the new version, a contractor cannot "undertake construction," and, more importantly as far as CU's position is concerned, an owner such as CU cannot be liable to a contractor such as Haren without the *consent* of TDOT. In other words, according to CU, Haren, in order to be successful at trial, must prove that TDOT had consented to Haren starting construction and also had consented to Haren's pursuit of a damage claim against CU. Since the complaint does not allege TDOT's consent, CU argues that any claim based upon a violation of Tenn. Code Ann. § 54-5-854(g) is subject to dismissal.

We hold that the version of the statute in effect when Haren commenced construction controls this case. To apply the newer version of the statute, first effective July 1, 1999, to activities during the period from December, 1998, through June, 1999 – the critical time frame of the

[3] We express no opinion as to whether CU's interpretation of the current version of the statute is correct.

allegations of the complaint – would have the impermissible effect of retroactively altering substantial rights secured to Haren under the earlier version. As we will discuss later in this opinion, Haren's cause of action accrued during a time when the earlier version of the statute was in effect. To apply the new version of the statute retroactively to Haren's claim is to divest it of a substantial right in place prior to the effective date of its passage. Statutes altering substantive rights are not to be given retroactive effect. ***Saylors v. Riggsbee***, 544 S.W.2d 609, 610 (Tenn. 1976), *quoted with approval in* ***Kuykendall v. Wheeler***, 890 S.W.2d 785, 787 (Tenn. 1994). Accordingly, we reject CU's argument that the current version of the statute is applicable to this case.

IV. *Theories of Recovery*

A. Negligence and Negligence *Per Se*

Haren alleges negligence and negligence *per se* on the part of CU in failing to properly locate and relocate its utilities away from the path of the construction improvements – the negligence *per se* being based upon an alleged violation of Tenn. Code Ann. § 54-5-854(g) (1998). CU contends that, under the Governmental Tort Liability Act ("the GTLA"), Tenn. Code Ann. § 29-20-101, *et seq.* (2000 & Supp. 2002), Haren's claims based upon theories of negligence are barred by the GTLA's one-year statute of limitations.

In general terms, causes of action against a public utility predicated on a theory of negligence are governed by the GTLA. *See* Tenn. Code Ann. § 29-20-102(3) (2000). The GTLA provides for a 12-month statute of limitations on all claims arising under it. Tenn. Code Ann. § 29-20-305(b) (2000). Haren's negligence claims, under the allegations of the complaint, accrued "soon thereafter," *i.e.*, soon after December 9, 1998, the date Haren commenced its work. *See* ***Sutton v. Barnes***, 78 S.W.3d 908, 916-17 (Tenn. Ct. App. 2002) (applying the discovery rule to a claim arising under the GTLA). The plaintiff did not file suit until January 5, 2001. Even interpreting the factual allegations of the complaint liberally in favor of Haren, there is no way we can construe "soon thereafter" to be a date on or after January 5, 2000. Haren does not argue that *all* of its negligence claims survive the bar of the statute of limitations. Rather, it argues that a portion of these claims arose later as it proceeded to undertake construction tasks along the stretch of highway covered by its contract. The law in Tennessee will not support this approach. We have addressed the real thrust of Haren's argument in language found in the ***Sutton*** case:

> [A] plaintiff may not delay filing merely because the full effects of the injury are not actually known; "such a delay would conflict with the purpose of avoiding uncertainties and burdens inherent in pursuing and defending stale claims." ***Wyatt*** [***v. A-Best Co.***], 910 S.W.2d [851, 855 (Tenn. 1995)].

78 S.W.3d at 913. Haren knew it had a cause of action against CU "soon []after" December 9, 1998. It may not have known then the full extent of its damages; but this does not excuse it from timely

pursuing its negligence claims. Those claims are barred under the GTLA and the trial court was correct in dismissing the counts based upon them.

B. Third-Party Beneficiary

Haren claims that it is an intended third-party beneficiary of a "general utility agreement" between TDOT and CU. As such, so the argument goes, it is entitled to recover damages against CU based on CU's failure to locate and relocate its utility services and facilities – a failure that Haren alleges is a breach of CU's contract with TDOT.

Haren's third-party beneficiary claim also fails to state a claim upon which relief can be granted. "Generally, contracts are presumed to be 'executed for the benefit of the parties thereto and not third persons.'" ***Owner-Operator Indep. Drivers Assoc., Inc. v. Concord EFS, Inc.***, 59 S.W.3d 63, 68 (Tenn. 2001). In ***Owner-Operator***, the Supreme Court restated the criteria for determining whether a party qualifies as a third-party beneficiary of a contract so as to vest it with standing to sue for that contract's enforcement:

> A third party is an intended third-party beneficiary of a contract, and thus is entitled to enforce the contract's terms, if
>
> (1) The parties to the contract have not otherwise agreed;
> (2) Recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and
> (3) The terms of the contract or the circumstances surrounding performance indicate that either:
>
> > (a) the performance of the promise will satisfy an obligation or discharge a duty owed by the promisee to the beneficiary; or
> > (b) the promisee intends to give the beneficiary the benefit of the promised performance.

Id. at 70. Viewing Haren's complaint in the light of this criteria, it fails to state a claim for which relief can be granted. The complaint does not state facts reflecting that there was a contract between TDOT and CU that "recogni[zed] . . . a right to performance in [Haren]." ***Id***. Furthermore, there are no *factual* allegations that satisfy the language of 3(a) or 3(b) in the ***Owner-Operator*** quote. To survive a motion to dismiss, a complaint must allege facts that show the existence of a valid claim for relief. The complaint before this Court makes only conclusory statements bearing on the ***Owner-Operator*** factors. This is not enough. The complaint fails to properly allege a claim based upon a theory of third-party beneficiary to a contract.

C. Claim Under Tenn. Code Ann. § 54-5-854(g)

Haren alleges that it has a "strict liability" claim under Tenn. Code Ann. § 54-5-854(g) that falls outside the ambit of the GTLA. CU counters this position with a number of arguments, much of which is based on CU's contention – rejected by us earlier in this opinion – that the current version of the subject statute applies to this case. When we construe the allegations of the complaint liberally in favor of Haren, in light of the language of the earlier, and controlling, version of Tenn. Code Ann. § 54-5-854(g), we conclude that Haren has stated a cause of action under the statute. However, we reject Haren's characterization of this claim as one for "strict liability." We do not believe this tort language is particularly helpful in evaluating the statutory claim in this case. In our judgment, it would be more appropriate to refer to the remedy created by Tenn. Code Ann. § 54-5-854(g) as "statutory liability."

It is clear that not all claims against governmental entities are covered by the GTLA. *See, e.g.*, ***Jenkins v. Loudon County***, 736 S.W.2d 603 (Tenn. 1987); ***Hensley v. Fowler***, 920 S.W.2d 649 (Tenn. Ct. App. 1995); ***Warnick v. Carter County***, C/A No. E2002-00833-COA-R3-CV, 2003 WL 174754 (Tenn. Ct. App. E.S., filed January 27, 2003). In fact, not even all *tort* claims against governmental entities are covered by the GTLA. *See* ***Jenkins***, 736 S.W.2d at 608-09 ("the general scope of the GTLA does not by its express terms encompass every tortious act or omission by governmental entities or employees"). What we must decide in this case is whether or not a claim under the express language of Tenn. Code Ann. § 54-5-854(g) falls under the GTLA.

It is clear to us that the pertinent language of the subject statute – providing that an "owner" (in this case, CU) who "fails to comply with and implement the provisions of [Tenn. Code Ann. § 54-5-854] . . . shall be liable to [TDOT's] contractor [(in this case, Haren)] for damages resulting from such failure" – creates a remedy, which, in this case, inures to the benefit of Haren.

This case is not unlike the Supreme Court case of ***Cruse v. City of Columbia***, 922 S.W.2d 492 (Tenn. 1996). In that case, the High Court had to decide whether a claim asserted under Tenn. Code Ann. § 40-17-118 (1990) was covered by the GTLA and thus untimely-filed, since it was embodied in a complaint filed more than one year after the accrual of the claim. That statute provides, in pertinent part, as follows:

> (a) Personal property confiscated as stolen property by a lawful officer of the state, a county or a municipality of the state to be held as evidence of a crime shall be promptly appraised, catalogued and photographed by the law enforcement agency retaining custody of the property.
>
> * * *
>
> (c) The state, county and/or municipal authority holding the property shall be responsible for the return of the property to the lawful owner

> and shall be liable in damages to the owner of the property in the event of damage or destruction occasioned by the delay in the return of the property.

The Supreme Court concluded in ***Cruse*** that the plaintiff's claim was not covered by the GTLA and its one-year statute of limitations. It opined that the following three-year statute of limitations applied to the plaintiff's claim:

> The following actions shall be commenced within three (3) years from the accruing of the cause of action:
>
> (1) Actions for injuries to personal or real property;
>
> (2) Actions for the detention or conversion of personal property; and
>
> (3) Civil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefor, when no other time of limitation is fixed by the statute creating such liability.

Tenn. Code Ann. § 28-3-105 (2000). The Supreme Court further opined as follows:

> Because the defendant's immunity from suit has been removed by a statute independent of the GTLA and plaintiff's suit is based on that independent statute, we conclude that the statute of limitations provided in the GTLA for circumstances in which immunity "has been removed as provided for in [that] chapter" does not apply.

Cruse, 922 S.W.2d at 497 (bracketing in original). The Court proceeded to say that "[s]ince the statute upon which plaintiff bases her cause of action does not contain a limitation period, the applicable time period is that set forth in Title 28, Chapter 3." ***Id***. Its analysis of those various code sections led it to conclude that Tenn. Code Ann. § 28-3-105 applied to the plaintiff's claim in that case.

The complaint filed by Haren seeks to recover damages under an "independent statute," *see* ***id***., and not under the GTLA. When we examine the natural and ordinary meaning of the language of the subject statute, *see* ***Guy v. Mutual of Omaha Ins. Co.***, 79 S.W.3d 528, 536 (Tenn. 2002), we reach the inescapable conclusion that it creates a remedy. In creating this remedy, the General Assembly waived the immunity of "owner[s]" such as CU from such suits. This the legislature clearly had the constitutional authority to do. *See* ***Cruse***, 922 S.W.2d at 495.

As we have previously noted, many of CU's arguments on the subject issue are based upon the current version of the statute. It does make an argument that the general tenor of the statutory

scheme of which Tenn. Code Ann. § 54-5-854 is a part reflects that the primary beneficiary of the scheme is, in the words of CU's brief, the "consuming public." In CU's view, "it is hoped [that the consuming public] will not suffer too heavily from increased utility costs related to the relocation of utility facilities required by road construction." Even if this be the case,[4] it is clear from the "natural and ordinary" meaning of the statutory language that a remedy was created for entities, such as Haren, who are damaged by an owner of utilities, such as CU, for failing to do that which is required by Tenn. Code Ann. § 54-5-854(g).

We hold, as did the ***Cruse*** Court under the facts before it, that the three-year statute of limitations found in Tenn. Code Ann. § 28-3-105 applies to the claim created by Tenn. Code Ann. § 54-5-854(g). Haren's claim under this latter code section was, according to the face of the complaint, timely-filed.

V. *Conclusion*

We vacate the trial court's order dismissing Haren's claim to the extent that dismissal pertains to the statutory liability claim asserted by Haren under Tenn. Code Ann. § 54-5-854(g). In all other respects, the order is affirmed. Exercising our discretion, we tax the costs on appeal to Cleveland Utilities. This case is remanded for further proceedings consistent with this opinion.

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CHARLES D. SUSANO, JR., JUDGE

[4] We express no opinion on CU's position with respect to the general tenor of the statutory scheme.